

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
SJ-2019-0143

COMMONWEALTH

RECEIVED

V.

APR 25 2019

JASON MCCARTHY

MAURA S. DOYLE CLERK
OF THE SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

**COMMONWEALTH'S MEMORANDUM IN OPPOSITION TO THE DEFENDANT'S
APPLICATION FOR INTERLOCUTORY APPEAL**

Now comes the Commonwealth through its District Attorney Michael D. O'Keefe and respectfully opposes the Petitioner's Application for Leave to Appeal. As reasons therefore the Commonwealth states that an interlocutory appeal would not facilitate the administration of justice.

The motion judge, after an evidentiary hearing, resolved all factual and legal issues against the Petitioner. The legal issues of fact or law can be resolved through existing case law. There are no novel questions presented in the application. The Petitioner also has an adequate post-trial remedy by appealing any conviction(s).

PRIOR PROCEEDINGS¹

1. The defendant was indicted by a Barnstable County Grand Jury on a charge of "Distribution of a Class B Substance, Subsequent Offense," G.L. c. 94C, §32A(b), on August 31, 2017. (G/2)
2. The defendant was arraigned on September 21, 2017 in Barnstable Superior Court. (G/2-3)
2. The defendant filed a motion to dismiss and order return of illegally seized money on March 7, 2018. (G/2-3)
3. The defendant filed a motion to suppress evidence, including statements, currency, confessions, seizure of cellphones, and contraband on July 5, 2018. (G/3-4)
4. The defendant filed a motion to suppress evidence from the Automatic License Plate Reader on July 5, 2018. (G/4)
5. Evidentiary hearings on the defendant's motions were held on January 13, 15, and 21 of 2019 before Rufo, J.² (G/4)
6. The defendant's motions were denied with findings of fact and law in a written memorandum by Rufo, J., on March 11, 2019.
(A/1-25; G/4)
7. The defendant filed a notice of appeal on March 26, 2019.
(G/4)

¹ Citation format will be as follows: to the defendant's application for interlocutory relief as "(Def.M.#)" and to the exhibits as "(Ex/#)."

² The Commonwealth has submitted the hearing audio on discs.

STATEMENT OF FACTS

The following facts are verbatim from the court's findings of fact and law. (A/1-25)

Eight exhibits were entered into evidence and, based on the credible evidence admitted and the reasonable inferences drawn therefrom, this court makes the following findings of fact.

Deputy Chief Sean Balcom has been with the Barnstable Police Department for over 30 years, serving for the past 20 years as a trained narcotics investigator. Deputy Chief Balcom has over 750 hours of narcotics training involving, amongst other things, how to utilize confidential informants in connection with drug investigations.

Investigation of the Whittemore Residence

During December, 2016 and January, 2017, Barnstable Police detectives, under the direction of Deputy Chief Balcom, began a drug investigation involving Brian Whittemore, Sr. (hereinafter "Whittemore"), and Brian Whittemore, Jr. (hereinafter "Junior"), who were suspected of distributing heroin from their residence located at 25 Skating Rink Road, Hyannis, Massachusetts (hereinafter the "residence"). Deputy Chief Balcom has known Whittemore for approximately 20 years and has received many complaints from Whittemore's neighbors regarding suspected illegal drug transactions taking place at or near his residence. As a result of recent complaints from neighbors in the fall of

2016, Deputy Chief Balcom and other Barnstable Police detectives conducted surveillance, as well as several controlled buys with confidential informants from the residence. During this time period, Deputy Chief Balcom and other detectives developed information from four confidential informants that Whittemore was distributing heroin from his residence.

On January 11, 2011, after conducting controlled buys with Whittemore using confidential informants, Barnstable police applied for a search warrant for the residence, which was granted. On January 11, 2017, the search warrant for the residence was executed by several detectives and officers of the Barnstable Police Department. As a result of the execution of the search warrant, evidence of drug distribution was found, including scales and baggies. However, no drugs were found at the residence on this date.

Surveillance Identifying McCarthy's Vehicle

Prior to the execution of the search warrant on January 11, 2017, Deputy Chief Balcom and Barnstable Police detectives had been conducting surveillance at the residence. During a surveillance, Deputy Chief Balcom noticed a black Hyundai Tucson with Registration No. 136AB6 appear briefly at the residence. A check with the Registry of Motor Vehicles ("RMV") indicated that the black Hyundai Tucson, Registration No. 136AB6 was registered to a Joyce McCarthy, 200 Weld Street, New Bedford,

Massachusetts. Information from a confidential informant indicated that Joyce McCarthy was the mother of Jason McCarthy, who lived with her at the same address. Deputy Chief Balcom conducted a check of the Massachusetts Probation Service and found that Jason McCarthy had over 50 past arraignments involving 30 prior narcotic violations. Sometime after January 11, 2017, Deputy Chief Balcom conducted surveillance at 200 Weld Street, New Bedford, Massachusetts and observed Jason McCarthy leaving that address in a black Hyundai Tucson.

The ALPR System and McCarthy's Vehicle

For approximately the last three and a half years, the Sagamore and Bourne bridges, which provide the only motor vehicle access between the mainland and Cape Cod, have employed the use of automatic license plate recognition ("ALPR") technology. ALPR technology uses bridge camera readers, combined with computer algorithms capable of converting images of license plates to electronically readable data. Brian Egnitz, a civilian employee of the Massachusetts State Police, who has 15 years of experience, serves as a technology project manager. Mr. Egnitz has installed fixed camera readers interfaced with the ALPR system on both sides of the Bourne and Sagamore bridges. These bridge camera readers are governed by the Department of State Police General Order Number TRF-11 (Exhibit# 1), dated July 22,

2014. The Barnstable Police Department has adopted the State Police General Order Number TRF-11 with respect to utilizing ALPR technology during the course of criminal investigations. Detective John York, a 32 year veteran of the Barnstable Police Department, is one of two Barnstable Police officers who have been given "user credentials" and are authorized to log into the ALPR system. The ALPR system is configured to allow vehicle license plate numbers of interest to be entered on a so-called "Hot List". Vehicles of interest on the Hot List may include stolen vehicles, vehicles associated with Amber Alerts, BE-ON-THE-LOOKOUTS (BOLOS), et cetera. A so-called "hit" is an indication that a license plate from the Hot List matches a record entered into the ALPR database. Once a hit is detected by the ALPR system, an "Alert", either by email or by text message, is sent to authorized users who have been identified on the ALPR system.

The Executive Office of Public Safety and Security ("EOPSS") maintains general oversight and control over the ALPR system. Information which is obtained by the ALPR readers is uploaded to a database located in Chelsea, Massachusetts. EOPSS has established a one year retention period for any information that is captured by the ALPR system. While EOPSS serves as the host for all ALPR data, the State Police maintains the camera

readers and hardware used for capturing license plate images on both the Sagamore and Bourne bridges.

On February 1, 2017, at the direction of Deputy Chief Balcom, Detective York entered Registration No. 136AB6 (the black Hyundai Tucson) as a Hot List registration number into the ALPR system. Once a license plate such as 136AB6 has been entered into the Hot List, the ALPR system can generate information as to when this particular license plate number travels to or from Cape Cod via the Sagamore or Bourne bridges. As an authorized user, Detective York had the ability to generate a spreadsheet relating to any license plate entered onto the Hot List.

At the direction of Deputy Chief Balcom, Detective York generated a spreadsheet relating to license plate 136AB6 (Exhibit #2). The spreadsheet for the dates December 1, 2016 through February 12, 2017 indicates that license plate 136AB6 made same-day round trips over the Bourne or Sagamore bridges on at least 21 separate dates. Also at the direction of Deputy Chief Balcom, Detective York entered the names of certain Barnstable Police detectives who were to be notified when an alert was recorded upon a hit detected by one of the bridge camera readers for license plate 136AB6.

The Brief Meetings Between the Defendants

On February 8, 2017, several Barnstable Police detectives received an alert from the ALPR system that license plate 136AB6 (the black Hyundai Tucson) had traveled over the Sagamore Bridge onto Cape Cod via Route 6. Shortly thereafter, Detectives Foley and Chevalier initiated surveillance of Whittemore's residence and observed Whittemore leave his residence in a grey Mercury sedan. The detectives followed Whittemore to Shallow Pond Road, Centerville, Massachusetts, a residential neighborhood that is in close proximity to Route 6.

At approximately 4:50 p.m., Sergeant Detective Butler observed at black Hyundai Tucson, operated by Jason McCarthy, exit Route 6 at Exit 6/Route 132 and enter the Burger King Mobil Service Center parking lot. Detective Butler observed McCarthy park in front of and enter the Mobil Mart convenience store. After a quick visit to the Mobil Mart convenience store, McCarthy re-entered the black Hyundai Tucson at approximately 4:55 p.m. From there, Detective Butler surveilled the black Hyundai Tucson to the area of Huckins Neck Road and Shallow Pond Road.

Detective Chevalier, who was on scene, observed the black Hyundai Tucson turn onto Shallow Pond Road, traveling to the end of that street where it was observed meeting up with the

grey Mercury sedan driven by Whittemore Less than 30 seconds later, both the grey Mercury sedan and black Hyundai Tucson exited the neighborhood. McCarthy was observed driving in the direction of Route 6 and thereafter traveling off of the Cape. Whittemore was surveilled travelling back to his residence.

Sometime during the early afternoon of February 22, 2017, Barnstable Police detectives received an alert that license plate No. 136AB6 had traveled over the Sagamore Bridge coming onto Cape Cod via Route 6. Deputy Chief Balcom deployed about ten Barnstable Police detectives and officers and instructed them to set up surveillance at Exit 6/Route 132 on Route 6, as well as at Whittemore's residence. Other detectives were deployed to the vicinity of Shallow Pond Road, in Centerville, Massachusetts. A short time later, detectives observed Whittemore leave his residence in his grey Mercury sedan and he was followed to the Shallow Pond Road location. A few minutes later, McCarthy was observed driving the black Hyundai Tucson, license plate No. 136AB6 turning from Exit 6/Route 132 from Route 6 onto Shoot Flying Hill Road. McCarthy was observed driving directly to the end of Shallow Pond Road and, after a brief 30 second meeting, both the grey Mercury sedan and the black Hyundai drove back towards Route 132.

Detectives using binoculars observed the meeting between Whittemore and McCarthy but did not see an actual exchange of objects, since they were approximately 150 yards away. Deputy Chief Balcom was continually apprised as to the location and activities of the vehicles driven by McCarthy and Whittemore. Believing that a drug transaction had taken place between Whittemore and McCarthy, Deputy Chief Balcom ordered the officers under his command to stop both vehicles after they left the end of Shallow Pond Road.

The Vehicle Stops

As Whittemore was driving back towards his residence in Hyannis, he was stopped on Bearses Way by Detectives Foley and Chevalier. The detectives were in an unmarked police vehicle and they activated their blue lights to effectuate the motor vehicle stop. Whittemore was immediately ordered out of his grey Mercury sedan and placed in handcuffs. Detective Chevalier did not indicate that he had concerns for officer safety or that there was a threat to public safety at the time he ordered Whittemore to exit his vehicle. Detective Chevalier immediately advised Whittemore of his Miranda rights, which he claimed he understood. Upon further questioning by Detective Chevalier, Whittemore admitted that he had just met "Jason" on Shallow Pond Road in order to pay him \$500 for some marijuana that he had purchased on a prior occasion. Whittemore further advised

Chevalier that he did not have any drugs on him or in his vehicle. Detective Chevalier conducted a pat down of Whittemore's outer clothing, which revealed that Whittemore had a hard, cylinder-like object tucked in the rear of his underwear. Detective Chevalier felt the outline of the object and determined that it was a "finger" of suspected heroin. Whittemore was transported to the Barnstable Police Department by other officers on scene in a marked police cruiser and the suspected "finger" of heroin was recovered in a private room located in the booking area.

Shortly after the Bearses Way motor vehicle stop of Whittemore, McCarthy was stopped by Detective York before he reached the on-ramp to Route 6 after leaving Shallow Pond Road. Detective York was in an unmarked police vehicle and he activated his blue lights to effectuate the motor vehicle stop. Detective York immediately ordered McCarthy out of his vehicle, placed him in handcuffs, and advised him of his Miranda rights, which he claimed he understood.

Shortly thereafter, several Barnstable police detectives and patrol officers in marked police cruisers arrived on scene to assist with the motor vehicle stop. Detective York did not indicate any concerns for officer safety or a threat to the public at large when he ordered McCarthy to exit his motor vehicle.

Detective Butler had a conversation with McCarthy, inquiring about his whereabouts, and McCarthy responded that he was from New Bedford and that his grandparents were buried in the National Cemetery. Detective Butler asked McCarthy if he had visited the cemetery today in Bourne, and he replied that he had not. Detective Butler asked McCarthy what his purpose was for coming all the way to Hyannis. McCarthy indicated that he and his girlfriend, Ms. Boucher, came to the Cape frequently and that they were interested in eating at a Longhorn Steakhouse restaurant on the Cape, and that he knows people in the area.

Detective Butler informed McCarthy that there were no Longhorn Steakhouse restaurants on Cape Cod. Detective Butler explained to McCarthy that he was involved in a narcotics investigation and that the Barnstable police had not stopped his car randomly. Detective Butler indicated to McCarthy that he felt he was being untruthful about his purpose for traveling to Hyannis and McCarthy replied, "I've done cases before" and "I've worked with the police before off-Cape." McCarthy agreed to be interviewed at the Barnstable Police Department, and was transported there by other Barnstable Police officers in a marked police cruiser.

Interviews at the Police Station

McCarthy was interviewed at the Barnstable Police Department booking room area at approximately 4:06 pm on

February 22, 2017 by Detectives Chevalier and Butler. This court has reviewed the entire recorded audiovisual DVD of McCarthy's police interview (Ex. 7), as well as a transcript of this interview (Ex. 4B).

As McCarthy entered the interview room, he was handcuffed behind his back. Upon entering the interview room, Detective Chevalier moved the handcuffs to the front of McCarthy's waist. Before the detectives began to interview McCarthy, he was advised of his rights by Detective Butler. After being read his rights, McCarthy indicated that he understood his right to remain silent and his right to counsel, and signed and dated a Barnstable Police Department Miranda Rights and Waiver form. (Ex. 6). McCarthy appeared calm and did not appear to be unsteady on his feet or under the influence of drugs or alcohol. During the course of the interview, he was able to converse freely with Detectives Butler and Chevalier.

Detective Butler began the interview by asserting that McCarthy hadn't been arrested or "booked", and that he was being detained for questioning. Detective Butler informed McCarthy the police had been following him, knew he had been meeting with Brian (Whittemore), and were prepared to arrest him for narcotics offenses. During the course of the interview, McCarthy

asked the detectives several times if he was being arrested, and the detectives responded that it was going to take some pretty good information for them to go to their supervisor to avoid McCarthy being arrested or charged that afternoon or evening. McCarthy responded by indicating that this was not his "first time" doing this, and further indicated that he could help the detectives but would take some time. The detectives questioned McCarthy about his "source," which McCarthy named "Pucho," his supplier. McCarthy further informed the police that he cooperated in a murder investigation in the past in New Bedford. McCarthy continually told the detectives that he is not a "big dude." McCarthy indicated that he wanted to help the police but he would not assist them if he were being charged. The detectives continued to question McCarthy about the number of times he met with Whittemore and/or Whittemore's son, Junior. McCarthy did not hesitate to answer the detectives' questions and did not appear to be coerced or forced to respond to any of the detectives' statements or questions throughout the entire interview. McCarthy indicated that he had been meeting with Whittemore on several occasions, sometimes one or two times per week, to sell Whittemore "fingers" of heroin for \$800, after purchasing them for \$750. McCarthy admitted being on Skating Pond Road earlier in the day and indicated that he knew of the execution of the prior January, 2017 search warrant at

Whittemore's residence where no drugs were found. During the course of the interview, \$917 in U.S. currency and two cell phones were taken from his person. The interview concluded at 4:48 p.m. on February 22, 2017.

Whittemore's Interview

At approximately 9:35 pm on February 22, 2017, Whittemore was interviewed at the Barnstable Police Department booking room area by Detectives Foley and Chevalier. This court has reviewed the entire recorded audiovisual DVD of this interview. (Ex 5.). As he entered the interview room, Whittemore was handed a candy bar by Detective Foley. Whittemore was advised of his Miranda rights by Detective Foley and after being read his rights, Whittemore indicated that he understood his right to remain silent and his right to counsel. Whittemore asked the detectives to retrieve his reading glasses so he could read the Barnstable Police Department Miranda Rights and Waiver form. With the aid of his reading glasses, Whittemore read the Miranda form, but declined to sign the waiver portion of the form stating he had "nothing to say." However, immediately thereafter, Whittemore began speaking with Detective Foley and Chevalier. Whittemore's demeanor throughout the interview was calm and he spoke in conversational tones. He was able to speak freely with the detectives and did not appear to be under the influence of drugs or alcohol. He made eye contact with the

detectives and responded to their questions without hesitation. Detectives Foley and Chevalier made no promises or threats to induce Whittemore to speak, and Whittemore's decision to speak freely with them during the 31 minute interview did not result from his will being overborne.

Whittemore told the detectives that he had met McCarthy through his son, Junior, and acknowledged he had been buying heroin from McCarthy for the last year. Whittemore stated he had been buying "sticks" of heroin from McCarthy and that McCarthy was charging him \$600.00 per "stick." Whittemore told the detectives he usually received a text message from McCarthy indicating he was making a trip to Cape Cod and asking if Whittemore "needed to see" him. Whittemore told the detectives that McCarthy chose the meeting spot on Shallow Pond Road after the search warrant of Whittemore's residence was conducted in January, 2017. Whittemore's interview with the detectives concluded at 10:06 pm on February 22, 2017.

Pretrial Discovery of ALPR System Data

In response to a discovery request from defense counsel in September, 2018, Detective York queried the ALPR system and discovered that information regarding license plate No. 136AB6 was no longer available, as the one-year retention period from the defendant's arrest date of February 22, 2017 had expired. Detective York was able to have the Barnstable Police

Information Technology Division query the Barnstable Police Department's email server. The query found copies of emails indicating that Alerts from the ALPR system had been generated to designated police officers in February, 2017. Detective York printed copies of these emails and provided them to the District Attorney's office. (Exhibit #3). These Alerts are in the form of both a printout of license plate No. 136AB6, indicating the time and lane of travel over either the Sagamore or Bourne bridges on various dates. The Alert printouts also contain a photo image of license plate No. 136AB6 and a photo of the rear portion of the vehicle. The Alerts recovered from the email server do not represent all of the alerts that were sent to the Barnstable Police during the course of the investigation. Approximately 12 Alerts were recovered out of numerous "hits" on 21 separate dates, as reflected in the spreadsheet generated by Detective York.

ARGUMENT

I. THE INTERESTS OF JUSTICE DO NOT REQUIRE AN INTERLOCUTORY APPEAL, NOR WOULD ONE FACILITATE THE ADMINISTRATION OF JUSTICE.

The Commonwealth estimates the defendant's trial to be three days long. Interlocutory review would not "contribute more to the reasonably prompt disposition of the case than it would to delay." *Commonwealth v. Vaden*, 373 Mass. 397, 400 (1977).

There is nothing special or out of the ordinary about the facts and law of this case that warrants delaying the trial for a pre-trial resolution of the merits of the motion judge's findings of fact and rulings of law. The law is well-established. The Petitioner's rights are fully preserved for any post-conviction appeal.

While admittedly there is no existing case that deals specifically with the ALPR system and the Fourth Amendment, "[t]here is no real question that the government, without securing a warrant, may use electronic devices to monitor an individual's movements in public to the extent that the same result could be achieved through visual surveillance."

Commonwealth v. Augustine, 467 Mass. at 252. It is also no question that there is no reasonable expectation of privacy in the exterior of a vehicle. The issue presented by the defendant, while involving a "new" technology, is not a "new" problem in Massachusetts jurisprudence. *Commonwealth v. Connolly*, 454 Mass. 808 (2009); *Commonwealth v. Augustine*, 467 Mass. at 252.

The Petitioner will not lose any rights by being required to wait until after trial to appeal the denial of his motion to suppress. The Petitioner's motion does not raise any novel questions of law.

II. THE DEFENDANT HAS NO EXPECTATION OF PRIVACY IN THE LICENSE PLATE READER IMAGES AND RECORDS OF THE CAR GOING OVER THE BRIDGES, WHERE THERE IS NO EXPECTATION OF PRIVACY IN THE EXTERIOR OF A CAR, AND FURTHER, IT WAS INFORMATION THAT AN OFFICER COULD OBSERVE WITH IN PLAIN VIEW.

The motion judge properly held that the defendants have no expectation of privacy in the images of their license plate captured by the cameras on the Bourne and Sagamore Bridges.

(A/14-15) A search implicating the Fourth Amendment occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed" and a seizure of property for purposes of the Fourth Amendment occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Karo*, 468 U.S. 705, 712 (1984) (*Karo*), quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

There is no expectation of privacy in the photograph of a car license plate when taken from a fixed point. "Societal beliefs, reflecting our common sense, undoubtedly support the conclusion that it is unreasonable to claim privacy in that which one consciously places in public view." *Commonwealth v. Starr*, 55 Mass. App. Ct. 590, 593 (2002) (holding that there is no expectation of privacy in a license plate).

The defendant's motion to suppress argued that the usage of the ALPR system is akin to cell site location technology ("CSLI"). The ALPR system is markedly different from CSLI.

"Much like the GPS tracking of a vehicle, cellphone location information is detailed, encyclopedic, and effortlessly compiled." *Carpenter v. United States*, 585 U.S. ____ (2018). This Court has recognized that CSLI involves precise tracking, over a period of time, either in real-time or historical, through individuals' daily activities. *Augustine*, supra; see also *Commonwealth v. Johnson*, 481 Mass. 710, 717-718 (2019).

"CSLI even limited to the cell site locations of telephone calls made and received may yield a treasure trove of very detailed and extensive information about the 'comings and goings' in both public and private places. . . ." *Commonwealth v. Augustine*, 467 Mass. 230, 251 (2014). The ALPR reader does not produce this "treasure trove" of information for law enforcement involving comings and goings of individuals, and does not involve private places.

The bridge cameras are at fixed-points and provide information for a specific location, contrasting with the breadth of CSLI information. The cameras cannot track a person's movement for an extended period of time. The photograph of the car driving over the bridge only shows law enforcement that a car has driven over a bridge, direction of travel, and the corresponding date or time. The information gleaned from the reader is not even comparable to the data from CSLI. Further, the camera takes a photograph of what a police

officer standing at the bridge could see, with plain view. The fact that this information was collected through image processing software and stored on a computer does not change the defendant's claim.

Moreover, there is no reasonable expectation of privacy in the publicly visible exterior of a vehicle. *Commonwealth v. Connolly*, 454 Mass. 808 (2009); see *New York v. Class*, 475 U.S. 106, 112-114 (1986) (noting that interior of vehicle, in contrast, is subject to Fourth Amendment protection). Additionally, for Fourth Amendment purposes, it is indisputable that there is no privacy interest in the movement of a vehicle traveling on a public roadway. See *United States v. Knotts*, 460 U.S. 276, 281-283 (1983). This contrasts with the Court's concerns in *CSLI* privacy, where police get a detailed look at personal information and day-to-day schedules of cellphone users. Taking a photograph of a car and using character recognition software to log when that car drives over a bridge does not raise the same privacy concerns as a detailed, minute by minute tracking of a cellphone.

The ALPR system "merely augmented officers' physical abilities and did not provide more information than officers could have obtained by visual surveillance." *Knotts*, 460 U.S. at 282. The Supreme Judicial Court has recently held, "[t]here is no real question that the government, without securing a

warrant, may use electronic devices to monitor an individual's movements in public to the extent that the same result could be achieved through visual surveillance." *Augustine*, 467 Mass. at 252. The judge correctly applied the same standard to the law enforcement ALPR tool.

The defendants assert that the amount of data saved on the ALPR reader creates an expectation of privacy, which is an incorrect analysis of the technology of ALPR readers. Again, officers can access CSLI and piece together an individual's day-to-day schedule. The ALPR reader storage does not provide an encyclopedia of one's daily activities. The data stored is of a fixed location, and the information gleaned from the ALPR reader is nowhere near that of CSLI. The ALPR system records the time the car crosses over the bridge and signals an "alert," but it does not provide long-term tracking of private activities in the sense of CSLI.

The concerns by this Court in *Commonwealth v. Augustine* do not apply to the circumstances of the ALPR reader. As argued above, the defendant does not have a subjective privacy interest in the photographs taken of the exterior of a car from a fixed-point, and therefore, there is no Fourth Amendment or art.14 violation.

III. THE ALPR SYSTEM DATA DOES NOT FALL WITHIN THE SCOPE OF THE FEDERAL STORED COMMUNICATIONS ACT OR THE FEDERAL ELECTRONIC COMMUNICATIONS PRIVACY ACT, AS THE DATA DOES NOT QUALIFY AS A COMMUNICATION.

The defendants also argue that ALPR system data falls within the scope of 18 U.S.C. §§ 2701-2712, the Federal Stored Communications Act ("SCA"), and 18 U.S.C. §§ 2510-2522, the Federal Electronic Communications Privacy Act ("ECPA"). The defendants assert that investigators were required to obtain a court order supported by a finding of reasonable suspicion before accessing this information. The defendants have not identified any case law applying the SCA or ECPA to ALPR system data, and rely solely on the statutory language. The standard of review is de novo.

Section 2703(d) was amended in February 1, 2019 requiring a warrant for a wire or electronic communication from "a provider or electronic communication service" in reflection of the United States Supreme Court holding in *Carpenter v. United States* that individuals have a fourth amendment privacy right with CSLI of one week duration. 18 USC §§ 2703(a)(d)(2019)

The judge correctly found that is clear that the ALPR system does not produce any form of "wire communication" as defined by the statute; there is no allegation that the system makes use of any technology relating to the sense of hearing, and thus it cannot fall within a definition which is limited to

"any aural transmission . . . ". 18 U.S.C. §§ 2510(1) (emphasis added). (A/17-18) Even CSLI does not qualify as a wire communication, because there is no human voice transmission. 18 USC §§2510(1).

The judge found that a closer match to the type of data produced by an ALPR system is found in the definition of "electronic communication," which includes "any transfer of ... images ... transmitted ... by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce ... ". 18 USC §§ 2510(12) (A/17-18). However, the ALPR system does not qualify as an electronic communication, or an electronic communication service. Compare *Crispin v. Christian Audgier, Inc.*, 717 F.Supp.2d 965, 982 (C.D. Cal. 2010) (holding that Facebook and MySpace are electronic communication service providers).

Not all "electronic communication[s]" are governed by the ECPA; the statute concerns only the disclosure or use of "intercepted ... electronic communications." 18 USC §§ 2511, 2516-2518 (emphasis added). The term "intercept" is defined as "the aural or other acquisition of the contents of any ... electronic ... communication through the use of any electronic, mechanical, or other device." 18 USC §§ 2510(4). Importantly, the statutory definition of "electronic, mechanical, or other device" explicitly excludes "any telephone

or telegraph instrument, equipment or facility, or any component thereof ... being used by ... an investigative or law enforcement officer in the ordinary course of his duties." 18 USC §§ 2510(5).

Therefore, the motion judge properly denied the defendant's motion, where a warrant was not required under both the SCA and ECPA.

IV. THE MOTION JUDGE CORRECTLY HELD THAT THE MASSACHUSETTS STATE POLICE GENERAL ORDER REGARDING ALPR DATA IS CONSTITUTIONAL AND NOT ARBITRARILY ENFORCED.

The judge found that, in a footnote, "the record evidence does not comport with the defendant's argument that the policy for ALPR data use and retention is either non-existent or arbitrarily adopted, such that the government's ALPR evidence in this case should be suppressed under art.14 or the Fourth Amendment." (A/15)

The Barnstable Police Department adopted the State Police regulations on ALPR data. While EOPSS serves as the host for all ALPR data, the State Police maintains the camera readers and hardware used for capturing license plate images on both the Sagamore and Bourne bridges. The defendant cannot succeed on this claim, where reviewing the ALPR policy indicates that it was not arbitrarily enforced. The court noted that since there were two fixed locations monitored, there is no reality

supporting the "defendant's attempt to summon a looming specter of 'tireless and absolute' surveillance." (A/15)

Where the motion judge properly denied this issue, the defendant cannot succeed on this claim.

V. THE MOTION JUDGE PROPERLY FOUND THAT THE DEFENDANT'S STATEMENT DID NOT VIOLATE MIRANDA AND ART.12, WHERE HE VALIDLY WAIVED HIS RIGHTS, HE UNDERSTOOD THE CIRCUMSTANCES AND HIS WILL WAS NOT OVERBORNE.

The defendant asserts that the defendants' statements regarding the suppression of their statements to police violated their *Miranda* rights and art.12.

The court first determined that such rights attached at the time the defendant made his statements, both on-scene and at the police station. *Commonwealth v. Mavredakis*, 430 Mass. 848, 859-860 (2000). These rights only attach when an individual is in custody. Here, where the defendants were ordered to exit the vehicles, placed in handcuffs, detained at the scene, and taken to the police station in marked cruisers, established it was a custodial interrogation. *Commonwealth v. Damiano*, 422 Mass. 10, 13 (1996) (physical restraint of the defendant at roadside was circumstance where a reasonable person would not feel free to leave).

While the test for voluntariness of a *Miranda* waiver and the voluntariness of a particular statement made during custodial interrogation are separate and distinct issues, the

test for both is essentially the same." *Commonwealth v. Newson*, 472 Mass. 222, 229 (2011). "The test for voluntariness is whether, in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act Under the totality of the circumstances test, [the court] consider[s] all of the relevant circumstances surrounding the interrogation and the individual characteristics and conduct of the defendant," including "promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence, and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of the *Miranda* warnings." *Commonwealth v. Tremblay*, 460 Mass. 199, 207 (2011).

The judge found that McCarthy was advised of *Miranda* rights at the scene of the vehicle stop. The court credited the officers that the *Miranda* rights were communicated to McCarthy, carefully and accurately. The court also held that the defendant had "sufficient intelligence and prior experience with the legal system" to understand the *Miranda* warnings, and that he was not impaired in any way. The court found that McCarthy

acknowledged that he understood those rights. The court also held that the interactions were conversational with McCarthy and measured. The court also found that the defendant was given his Miranda rights at the station for a second time before questioning, and he understood those rights. (A/24)

The court addressed the defendant's claim that police trickery overcame his will to remain silent, per *Commonwealth v. Newson*, 471 Mass. 222 (2015). The motion judge stated that "[t]he detective's comments, like those in *Newson*, served to emphasize, not minimize, the seriousness of the crime under investigation and McCarthy's suspected conduct." See *Newson*, 471 Mass. at 231. (A/24)

The defendant's claim of trickery was raised in the context where the defendant himself brought up issues of leniency and his past cooperation and assistance with police. He was clearly aware of the circumstances and there was no indicium of coercion. McCarthy had extensive experience in the criminal justice system. He initiated a discussion with the police, roadside, asking for leniency. The court found there was no evidence of coercion. See *Commonwealth v. Tremblay*, 460 Mass. at 208. The judge found that "McCarthy was not misled as to the severity of his situation." (A/25)

VI. THE POLICE HAD PROBABLE CAUSE TO CONDUCT A MOTOR VEHICLE STOP OF THE DEFENDANT'S VEHICLE.

The defendant asserts that the stop of the vehicle on February 22, 2017 was not supported by probable cause. (D.Mem.3)

The investigators possessed the ALPR records, which illustrated a pattern of the defendant making frequent and brief trips to Cape Cod over several weeks. The police had visual observations of the defendant's vehicle visiting the co-defendant's residence on multiple occasions. Moreover, the defendant's vehicle met with the co-defendant briefly on Shallow Pond Road, on the date of the stop, February 22, 2017. The defendant was observed driving directly to the end of Shallow Pond Road and after a brief 30 second meet up, both the Mercury and the Hyundai drove back towards Route 132. Both vehicles were subsequently stopped after they left the end of Shallow Pond Road. The judge noted the multiple controlled buys at the co-defendant Whittemore's home, plus the defendants' multiple convictions for narcotics offenses. The judge correctly held that there was probable cause to believe that the defendant McCarthy was supplying heroin to Whittemore several times per week, enabling Whittemore to resell it locally. Cf. *Commonwealth v. Levy*, 459 Mass. 1010, 1011-1012 (2011) (probable cause may be present where suspected drug transaction observed

without actually witnessing object exchange, if officers also knew parties had history with illegal drugs).

Taken in conjunction with controlled buys of narcotics from the co-defendant, Whittemore, the observations of the police of the defendant's "frequent and brief" trips to Whittemore's residence, the ALPR tracker data, and the observations on Shallow Pond Road, the defendant cannot succeed on this claim.

VII. THE BARNSTABLE POLICE DID NOT ILLEGALLY SEIZE THE DEFENDANT'S BAIL MONEY, WHERE THE MONEY WAS SEIZED BEFORE IT WAS USED AS BAIL MONEY, AND THE POLICE HAD PROBABLE CAUSE IT WAS EVIDENCE OF THE DEFENDANT'S DRUG DEALING.

The defendant asserts that Barnstable Police illegally seized his bail money. The record reflects that police had probable cause to seize the money his brother Gordon McCarthy brought to the police station. The judge correctly denied the defendant's motion for return of property/dismiss indictment³, where he found that probable cause existed to seize the defendant's bail money. The following facts and judge's findings can be heard in the audio CD's submitted with the Commonwealth's opposition. For the testimony of Sergeant Butler, See CD January

³ As a preliminary matter, the defendant filed a motion to "dismiss the indictment" or in the alternative, suppress the evidence. "The denial of a motion to dismiss in a criminal case is not appealable until after trial, and [the Court] has indicated many times that G.L. c. 211, § 3 may not be used to circumvent that rule." *Jackson v. Commonwealth*, 437 Mass. 1008, 1009 (2002).

15, 2019, at 10:48 A.M. For the judge's findings, please see CD January 23, 2019 at 12:06 P.M.

A bail commissioner set bail at \$10,000 for the defendant on the evening of his arrest.⁴ McCarthy called his mother on several occasions and explained that he was arrested with his girlfriend, and they needed ten thousand dollars. He told his mother he had "nine" and needed "one more." The defendant became agitated since his mother was having a difficult time understanding his request. The defendant requested that "Gordy" be put on the phone, and then the defendant told Gordy to go to his drawer, "I need one more, I have nine."

The defendant called "Gordy" forty five minutes later, and there was a discrepancy with the amount of money that Gordy counted and the amount that McCarthy expected him to have. The defendant instructed him to go to a second drawer, where there would be two envelopes. McCarthy stated, "it should be nine." Several more minutes of conversation ensued, and it was apparent that the defendant was having a difficult time coming up with three to four hundred dollars. The defendant instructed Gordy to go to "Kiana's" house for the remaining money. Kiana is Jenn's daughter.

⁴ Facts are taken from Sergeant Butler's testimony, 1/15/19 at 12:06 PM.

Neither Gordy, nor the defendant's mother, knew the location of the money until directed to its location, the defendant's bedroom drawers. Moreover, the defendant stated during booking that he was unemployed.

Two hours later, Gordon McCarthy, the defendant's brother, arrived with money. He said that he obtained the money from a bunch of people. He said that "his mom" and "my uncle, who is a New Bedford Police Officer." Gordon could not name other individuals who provided money. Sgt. Butler asked if he saw his uncle provide his mother with the money, and he said yes. Gordon then admitted to police that he followed his brother's instructions and obtained the money from his brother's room.

Drug distribution is a cash business. Allowing the defendant to post the money would have, in essence, "cleaned" the money, and aided in the defendant's illegal drug distribution business. Based on the facts summarized above, police had probable cause to seize the money.

Police did not impose excessive bail or violate the defendant's right to bail. Gordy brought his brother's money to the police station, and it was seized before it was posted as bail money. Police did not arbitrarily impose bail, as asserted by defense counsel, where the \$10,040 remained in place. The judge correctly found that police had probable cause to seize the funds, and then commence forfeiture proceedings, where the

police had probable cause that the money was drug distribution profits.

Police had probable cause that the money "Gordy" brought was profit from the defendant's drug distribution business, therefore, the Barnstable Police Department properly seized the money and did not violate the defendant's right to bail.

VIII. THE DEFENDANT MAY NOT ASSERT TARGET STANDING, WHERE HE CANNOT ESTABLISH A VIOLATION OF HIS RIGHTS, AND MOREOVER, MASSACHUSETTS HAS NEVER RECOGNIZED TARGET STANDING.

Massachusetts has never recognized target standing. This case is similar to the recent case of *Commonwealth v. Santiago*, 470 Mass. 574 (2015). The police stopped a defendant who was a suspected drug seller and separately stopped the buyer. The Court concluded, "this is not an appropriate case to consider the adoption of target standing" as to permit the seller to suppress the drugs taken in the stop of the buyer. The Supreme Judicial Court stated that in a case where the police engage in "distinctly egregious" conduct that constitutes a significant violation of a third party's art.14 rights in an effort to obtain evidence against a defendant, it may be appropriate to permit the defendant to rely on the standing of the other individual. *Santiago*, *supra* at 578.

Here, factually, the defendant cannot establish the existence of "distinctly egregious" conduct that would warrant the application of target standing.

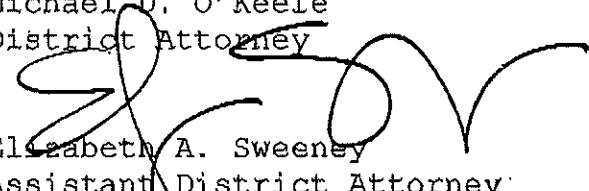
This case is also similar to *Commonwealth v. Vacher*, where the court held that "even assuming the availability of target standing under art.14, the defendant cannot establish that he was the prime target of the police investigation and therefore was properly denied target standing to challenge the violations of the [third party's] constitutional rights." 469 Mass. 425, 437 (2014).

Here, the Court should decline to grant relief for the defendant's claim of target standing. The police did not engage in "distinctly egregious conduct." The defendant cannot succeed on this claim.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court deny the relief requested and return the case to the trial court.

Respectfully submitted,
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April 22, 2019

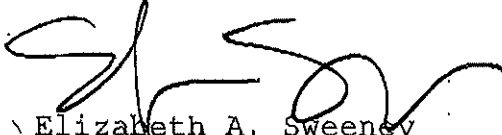
EXHIBITS

- A. Judge's Findings
- B. Defendant's Motion to Suppress
- C. Defendant's Motion to Suppress
- D. Defendant's Motion to Dismiss/Suppress
- E. Transcript of Defendant's Interview, Motion Exhibit
- F. Docket, *Commonwealth v. McCarthy*, 1772CR107

CERTIFICATE OF SERVICE/CERTIFICATE OF MAILING

I, Elizabeth A. Sweeney, have served via first-class mail, postage prepaid, a copy of the Commonwealth's Opposition and Supporting Exhibits to the Clerk of the Single Justice Session, Supreme Judicial Court, and a copy to defense counsel:

Paul Bogosian, Esq.
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Dartmouth, MA 02747



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Assistant District Attorney

April 22, 2019